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No. 97-850

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

United States of America ex rel. McKenzie,
Petitioner

v.

BellSouth Telecommunications, Inc.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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PARTIES TO THE PROCEEDING

BellSouth Telecommunications, Inc. ("BellSouth") is a wholly owned subsidiary of BellSouth Corporation, which is a publicly traded corporation that is a parent to a number of subsidiaries, all of which are wholly owned.

The other party to the proceeding is Mary C. McKenzie, as set forth on page ii of her certiorari petition brief.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OMISSIONS AND INACCURACIES IN McKENZIE'S STATEMENT OF THE CASE

BellSouth provides telephone service in nine southeastern states, including Tennessee where McKenzie was employed. In March of 1992, at the time of McKenzie's placement on permanent disability leave from her employment, BellSouth had two divisions, Southern Bell and South Central Bell. *United States ex rel. McKenzie v.*

BellSouth Telecommunications, Inc., No.3:94-cv-730, app. at 48a, (E.D. Tenn. February 23, 1996) (Memorandum Order Granting BellSouth's Motion to Dismiss) (hereinafter referred to as the Dismissal Order). McKenzie was placed upon permanent disability leave after she suffered two emotional breakdowns. *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, app. at 4a, 123 F.3d 935, 937 (6th Cir. 1997).

As acknowledged by McKenzie in her certiorari petition brief at page 6, two lawsuits had been filed against BellSouth prior to McKenzie bringing her claims of fraud to the attention of the United States. One of the lawsuits, the *Dorris* action, filed in Tennessee state court and removed to the United States District Court for the Western District of Tennessee, involved South Central Bell. *McKenzie*, app. at 7a, 123 F.3d at 939. The other, the *Falsetti* action, filed in the United States District Court for the Northern District of Florida, involved Southern Bell. *McKenzie*, app. at 8a, 123 F.3d at 939.

Both previously filed lawsuits garnered a great deal of media coverage in newspapers of general circulation. *Id.* McKenzie acknowledged in her complaint that while employed by BellSouth in Tennessee she showed her supervisor a newspaper article concerning the *Falsetti* case filed in Florida. *Id.*

When McKenzie finally filed suit against BellSouth in December of 1994, "large portions of McKenzie's complaint [were] nearly identical to portions of Falsetti's complaint," which had been filed in July of 1991. *Id.* The *Falsetti* action was a False Claims Act *qui tam* action involving federal customers. *Id.* The allegations of the *Dorris* action, while not directly addressing fraud against

federal facilities, were "nearly identical to some of McKenzie's claims." *Id.*, app. at 7a., 123 F.3d at 939.

The United States did not intervene in McKenzie's *qui tam* action. *McKenzie*, app. at 4a n.2, 123 F.3d at 937 n.2. Nor did the United States intervene in the *Falsetti* action where the attorney for the United States Department of Justice, Civil Fraud Section, had been deposed. Dismissal Order, app. at 40a. The Department of Justice attorney testified in deposition that he had become aware of the allegations of fraudulent conduct by BellSouth as early as the spring of 1990 through meetings with the attorney representing Falsetti. *Id.*

In the Dismissal Order of the United States District Court for the Eastern District of Tennessee, Judge James H. Jarvis, found McKenzie's "allegations regarding alleged falsification of government records is based upon 'information and belief' as opposed to knowledge which is 'direct and independent.' In fact, McKenzie does not allege even one instance in which a falsified record went to the government, upon which the government relied in paying funds to BellSouth. Likewise, she does not allege one instance in which the government requested a refund [as required under the applicable Tennessee tariff], which was denied. Ms. McKenzie has no personal knowledge of the specific time, place, or content of any fraud perpetrated upon the United States Government." Dismissal Order, app. at 58a-59a. The district court also found McKenzie's claims to "appear to be 'derived from' the allegations of the Falsetti complaint. . . . McKenzie alleges that she 'showed Ms. Crum [her supervisor] a copy of the newspaper article about a similar fraud being perpetrated by the telephone company in Florida." *Id.*, app. at 52a-53a. The district court concluded, "this lawsuit is in part 'derived from' the Falsetti case and,

thus, in the court's opinion, is somewhat parasitic." *Id.*, app. at 53a.

The United States Court of Appeals for the Sixth Circuit, affirmed in part the Dismissal Order. (The court of appeals reversed the district court's dismissal of the McKenzie's retaliation claim, which is not at issue in the certiorari petition.) The panel found "[i]t is clear that McKenzie's allegations were publicly disclosed prior to the filing of her suit through the *Falsetti* and *Dorris* cases and the publicity related to them." *McKenzie*, app. at 9a, 123 F.3d at 940. The court of appeals concluded McKenzie's claims were "based upon" these public disclosures, observing "They are not merely similar to the allegations in *Dorris* and *Falsetti*; portions of McKenzie's complaint are virtually identical to the complaint in *Falsetti*, and McKenzie admits, in her complaint, awareness of the *Falsetti* allegations. In addition, her allegations are the same as some of the allegations made by Dorris and reported in the Tennessee newspapers." *Id.*, app. at 11a, 123 F.3d at 940-41. Finally, the court of appeals found McKenzie's "complaint was filed three years after *Falsetti* and well after the allegations in *Dorris* were made public. She was not the first to inform the government of the alleged fraud being perpetrated by BellSouth . . . . McKenzie is not a 'true whistleblower' and cannot benefit as if she were one." *Id.* at 16a-17a, 123 F.3d at 943.

REASONS NOT TO GRANT THE WRIT OF CERTIORARI

A. There is No Important Matter at Issue

As recently recognized by this Court, the relator's interest in a *qui tam* action and those of the United States Government do not necessarily coincide. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S.Ct. 1871, 1877 n.5 (1997). "As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are primarily motivated by prospects of monetary reward rather than the public good." *Id.* at 1877.

At issue in McKenzie's case is whether the district court had jurisdiction over her *qui tam* action to recover a portion of an award that would otherwise go to the United States Government. In this case, the facts are undisputed that the Government, in particular, the United States Department of Justice, Civil Fraud Division, had been aware of the alleged fraud for more than four years before McKenzie's counsel went to the United States District Attorney for the Eastern District of Tennessee.

The court of appeals' opinion affirming in part the Dismissal Order did nothing to decrease the incentive of a potential *qui tam* relator to bring to the attention of the Government an alleged fraud being perpetrated upon it. If anything, the court of appeals' opinion strengthens the incentive for an individual having knowledge of a fraud to bring it to light immediately and directly to the Government.

Under the Sixth Circuit's analysis in *McKenzie*, the jurisdictional requirements of the False Claims Act were interpreted to preclude individuals, except original sources, "who base any part of their allegations on publicly disclosed

information from bringing a qui tam action." *McKenzie*, app. at 11a, 123 F.3d at 940; *see United States ex rel. Precision Co. v. Koch Industries*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993). There is no important governmental interest in allowing a *qui tam* action to proceed under these circumstances. Recently, the United States stated the Government's position in this regard. Unless the relator is an original source, "qui tam lawsuits brought in these circumstances – after a public disclosure has occurred showing that the government is itself taking action or is capable of taking action – are likely to bring the Treasury nothing more than what government prosecutors would have recovered on their own initiative, and they divert a portion of that recovery unnecessarily from the Treasury to private hands." Amicus Brief of the United States at n.12, 1997 WL 744847 (filed December 31, 1996), *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S.Ct. 1871 (1997).

Furthermore, the Sixth Circuit's analysis of the term "original source" is also consistent with encouraging a potential relator to report fraud on the Government at the earliest possible opportunity. The court of appeals found "it difficult to understand how one can be a 'true whistleblower' unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain." *McKenzie*, app. at 14a, 123 F.3d at 942. The Sixth Circuit went on: "The government has the clearest interest in the information and the FCA was designed to give whistleblowers the incentive to provide the government with such information. Furthermore, this interpretation protects the 'true whistleblower,' the person who reports fraud to the government before it is publicly disclosed, by allowing her to maintain a qui tam action." *McKenzie*, app. at 16a, 123 F.3d at 943.

Under these circumstances, the only issue in McKenzie's petition is whether the Dismissal Order deprived her a potential share of a recovery that is the Government's, not hers, to pursue. This is purely a private matter of a wealth transfer from the public fisc to McKenzie that does not involve any important matter over which this Court should exercise its jurisdiction by way of certiorari.

B. McKenzie's Facts Make this Case an Inappropriate Vehicle to Resolve the Conflict among the United States Courts of Appeals

There is a conflict among the United States Courts of Appeals over the precise interpretation of the terms "based upon" under the public disclosure subsection and the "original source" subsection of the False Claims Act. 31 U.S.C. δ 3730(e)(4)(A)-(B) (1994).

The United States Court of Appeals for the Fourth Circuit interprets the phrase "based upon" in subsection 3730(e)(4)(A) to mean "derived from" while the other United States Courts of Appeals that have addressed the issue have generally interpreted it to mean "supported by" or "similar to." *Compare United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) with *McKenzie*, app. at 9a-11a, 123 F.3d at 940-41; *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F. 3d 1000, 1006 (10th Cir. 1996); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995); *Cooper v. Blue Cross and Blue Shield*, 19 F.3d 562, 567 (11th Cir. 1994); *United States ex rel. Precision Co. v. Koch Industries*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993); *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990). *See also United States*

ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 688-89 (D.C. Cir. 1997), *cert. denied*, 66 U.S.L.W. 3259 (U.S. October 6, 1997)

However, this conflict would not affect the outcome of the dismissal of McKenzie's case for lack of jurisdiction. The district court's Dismissal Order found McKenzie's *qui tam* claims to be both "supported by" and "derived from" from the *Falsetti qui tam* action which had been filed three years before she filed her action. *Supra* at 7; Dismissal Order, app. at 52a-53a. These findings were left undisturbed by the court of appeals.

The same is true with respect to the conflict among the United States Courts of Appeals over the interpretation of the term "original source" in subsection 3730(e)(4)(B). The district court's Dismissal Order analyzed McKenzie's factual allegations from the perspective of the varying interpretations of that term. The district court found McKenzie failed to meet the requirement that she be an original source, regardless of which precise interpretation was applied, because her knowledge was not direct and independent. *Supra* at 7; Dismissal Order, app. at 58a-59a.

On appeal, the Sixth Circuit did not disturb these findings. The court of appeals added that McKenzie was not an original source within the meaning of that term as interpreted by the United Stated Court of Appeals for the District of Columbia Circuit in *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997), *cert. denied*, 66 U.S.L.W. 3259 (U.S. October 6, 1997), a case decided after the Dismissal Order was entered. *McKenzie*, app. at 13a-17a, 123 F.3d at 942-43.

Regardless of the interpretation of the controverted terms, "based upon" and "original source," the outcome in

McKenzie's case would be the same. The district court was without jurisdiction over her *qui tam* action. Under these circumstances, it would be improvident for the petition for a writ of certiorari to be granted.

C. The Sixth Circuit's Interpretation of Subsections 3730(e)(4)(A)-(B) is the Correct Result

The Report of the House of Representatives to the 1986 Amendments to the False Claims Act succinctly set forth the purpose of the qui tam provisions of the Act. "The purpose of the qui tam provisions of the FCA is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward." H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986), *quoted* in *McKenzie*, app. at 15a, 123 F.3d at 942-43.

Despite the conflict among the United States Courts of Appeal, this Court should not grant the petition because the Sixth Circuit's opinion in *McKenzie* reached the correct result for the correct reason. The Sixth Circuit thoroughly explored and critically analyzed the differing viewpoints of the courts of appeals. The Sixth Circuit's guiding beacon was the underlying purpose of the *qui tam* provisions of the False Claims Act, as reflected in the Congressional Record and the history of the Act.

The Sixth Circuit disagreed with the Fourth Circuit's interpretation of "based upon" because it was not "the most consistent with the FCA's purpose. The jurisdictional requirements were designed to restrict the number of persons who can bring qui tam actions and thereby avoid parasitic actions." *McKenzie*, app. at 10a-11a, 123 F.3d at 940. The Sixth Circuit interpreted "based upon" to mean, "supported by" in order to "effectively preclude individuals who base

any part of their allegations on publicly disclosed information from bringing a qui tam action." *Id.*, app. at 11a, 123 F.3d at 940. In so doing, the Sixth Circuit joined four other United States Courts of Appeals, which had also analyzed and decided the issue. The interpretation of the Second, Sixth, Ninth, Tenth and Eleventh Circuits is the correct one.

The Sixth Circuit adopted the District of Columbia Circuit's interpretation of "original source" in *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997), *cert. denied*, 66 U.S.L.W. 3259 (U.S. October 6, 1997). *McKenzie*, app. at 16a, 123 F.3d at 943. In the D.C. Circuit's 1997 decision, an opinion by Judge Wald, the court of appeals held that "an 'original source' must provide the government with the information prior to any public disclosure." *Findley*, 105 F.3d at 690. As the court of appeals explained in *Findley*, the only reading of the statute that accounts for the requirement that an "original source" voluntarily provide information to the Government before filing suit "is one that requires an original source to provide the information to the government prior to any public disclosure." *Id.* at 691.

The Sixth Circuit found the "D.C. Circuit's requirements do more to promote the FCA's mission – to alert the government that a fraud is being perpetrated against it." *McKenzie*, app. at 16a, 123 F.3d at 943. The Sixth Circuit correctly concluded "the individual who sits on the sidelines while others disclose the allegations that form the basis of her complaint should not be able to participate in any monetary award. This would be contrary to the purpose of the statute." *Id.*, app. at 15a-16a, 123 F.3d at 943.

McKenzie was correctly decided. There is no need for this Court to grant the writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

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